The representations AUSA Miquelon made to Judge Herndon regarding the sealing of the indictment are a critical issue in Mr. Hawkin's 2255 petition. Her shifting rationales are evidence of intentional prosecutorial misconduct designed to keep exculpatory information from the defense and to improperly shore up a case that had serious statute of limitations, venue, and other substantive problems. Judge Herndon is one of the primary witnesses to AUSA Miquelon's conduct. Yet, efforts to have him recused have been unsuccessful.

The record gives the appearance that AUSA Miquelon had off-the-record contacts with Judge Herndon about the indictments, that Judge Herndon received information about the case that is not included in the record, and that the record of AUSA Miquelon's actions in this case is incomplete. These concerns have been unsuccessfully raised in the District and Circuit Courts as a basis to remove the trial judge from consideration of Hawkins 2255 and post *Booker* remand. This is the judge who sentenced Hawkins to ten years in prison. Co-defendant Joe Calio, the individual that paid the gratuity received probation. This occurred despite the fact he had (unbeknownst to Hawkins) received $1.2 million in kickbacks from an Exide advertising agency. The Belleville News Democrat reported that, Calio's brother, Nicholas Calio, resigned as an aid to President Bush shortly after Hawkins trial and Miquelon's resignation as United States Attorney.

The defense needs to call Judge Herndon as a witness to examine him about AUSA Miquelon's actions and representations regarding the permanent sealing of original indictment, what information he received about this case from outside the case, and how those factors played into his decisions to keep the indictment permanently sealed. This scenario places Hawkins in the unenviable position of confrontation with the trial judge who presided over his discretionary remand. The combination of factors set forth

herein favor reassignment of any re-sentencing to a different trial judge and support Hawkin's argument that his 10 year sentence when weighed against 18 U.S.C. §3553(a) factors is not reasonable nor in compliance with the Sixth Amendment.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE TH EE WAY SPLIT IN THE CIRCUIT COURTS APPLICATION OF PLAIN ERROR ON POST *BOOKER* REMAND

The courts of appeals are sharply divided over the application of plain error on post *Booker* remand. The Court should grant the writ to resolve the split in the circuits and to establish uniformity for the hundreds of cases being remanded.[5]

II. THE CURRENT DIVISION BETWEEN THE CIRCUITS HAS SIGNIFICANT INSTITUTIONAL COSTS WHICH JUSTIFY INTERVENTION BY THIS COURT AND COUNSEL IMMEDIATE ACTION

Absent this Court's authoritative intervention in a controversy currently fragmenting the federal circuits as a result of the now pointedly antagonistic approaches to dealing with post *Booker* plain error remands gross sentencing disparity will continue to prevail.

The conflict between the circuits over the plain error

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[5]On January 24, 2005 Hawkins case and 397 others were remanded to circuit courts pursuant to *Booker*. In order to provide this Court with some clarity as to the disparity created by the plain error application split App. D is included. This one day analysis is a mere sampling of post *Booker* disparity depending on the defendant's location when prosecuted.

post *Booker* remand indicates that the conflict between these circuits is robust, and as such promises to generate continued divergent outcomes in a broad range of cases.

III. THE REMEDY IN BOOKER PART II DENIES A DEFENDANT'S SIXTH AMENDMENT RIGHT.

Our American system of justice was founded on a defendants right to a jury trial. Justice is not served in the case of a defendant who has been given a ten year sentence, of which only 5% was adjudicated by the jury. The Judge determined the remainder of the sentence. None of the factors that increased Hawkins sentence from six months to ten years were charged in the indictment or decided by the jury. Hawkins was charged with wire fraud and conspiracy to commit wire fraud, not the variety of things used to enhance his punishment.

IV. THE CURRENT REASONABLENESS STANDARD OF REVIEW CREATES UNCHECKED DISPARITY.

There is no clear definition of what a reasonable sentence is or is not. Therefore, this allows for subjective sentences insulated from appellate review.

V. PETITIONER'S SENTENCE WHEN WEIGHED AGAINST 18 U.S.C. §3553(a) FACTORS IS NOT REASONABLE.

Hawkins is serving a ten year term, nine and one-half in violation of his Sixth Amendment right to jury finding. This has occurred despite the extraordinary relief granted by this Court in its January 24, 2005 grant of certiorari to petitioner. Hawkins case is a perfect one to highlight the continuing existence of the Sixth Amendment problem *pre-Blakely* and *Booker*. Hawkins remand was

determined by a Judge who refused to recuse himself despite valid reasons.

VI. ARGUMENT IN SUPPORT OF GRANTING THE WRIT

Whether This Court Should Grant the Writ to Resolve the Split In the Circuits Regarding Application of Plain Error on Post *Booker* Remands?

Given the limited number of preserved *Apprendi*, *Blakely*, and *Booker* errors at the district court level it is not surprising that countless cases on direct appeal are being remanded for reconsideration under the plain error standard of review. Federal Rule of Criminal Procedure 52(b) sets out the four prongs of plain error review as follows: (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention. Under the test, before an appellate court can correct an error not raised at trial, there must be (1) 'error', (2) that is 'plain', and (3) that 'affects substantial rights.'" *Johnson v. United States*, 520 U.S. 461, 466, 467, 137 L.Ed.2d 718, 117 S.Ct. 1544 (1997) (quoting *Olano*, supra, at 732). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732, 123 L.Ed. 2d 508, 113 S. Ct. (1993).

The First, Fifth, Eighth, Tenth, Eleventh, and District of Columbia Circuits[6] are rigorous in applying the

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[6] *United States v. Antonakopoulas*, 399 F.3d 68 (1st Cir. 2005); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Pirani*, 406 F.3d 543 (8th Cir. 2005); *United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. 2005); *United States v. Rodriguez*, 406 F.3d 1261 (11th Cir. 2005); and *United States v. Coles*, 403 F.3d (D.C. Cir. 2005).

plain error standard of review by requiring defendants to make a specific showing of prejudice from application of mandatory guidelines to satisfy the third step in plain error review.

The Second and Seventh Circuits[7] have taken a less stringent, but equally troubling, approach requiring that when the guidelines impact as being advisory is unclear, the circuit court will ask the sentencing judge whether a defendant was prejudiced by advisory guidelines in order to satisfy the third step required in plain error analysis.

The Third, Fourth, Sixth and Ninth Circuits[8] appear to have adopted a presumption of prejudice standard that a defendant was prejudiced by being sentenced pursuant to mandatory guidelines in order to satisfy the third step required in plain error review.

The extreme divergence among the circuits on plain error remand is creating disparate treatment of criminal defendants dependent upon their location when arrested and prosecuted. Petitioner Hawkins is a perfect example. If Hawkins had been arrested and prosecuted in the Eastern District of Michigan (Sixth Circuit) where Exide's corporate office was located, rather than Southern District of Illinois (Seventh Circuit), he would have automatically had a new sentencing hearing made possible by this Court in *Booker*.

The three way circuit split is not an insignificant one. This split is impacting criminal defendants every day in different ways and is denying them the basic tenant of

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[7] *United States v. Crosby*, 397 F.3d (2nd Cir. 2005),and *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005).

[8] *United States v. Davis*, 407 F.3d 162 (3rd Cir. 2005); *United States v. Hughes*, 401 F.3d 546 (4th Cir. 2005); *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005); and *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005).

justice wherein the laws predictability is settled so they know how to order their affairs.

In recognition of the circuit splits on plain error on Booker remands, Judge Lucero from the Tenth Circuit in *Gonzalez Huerta*, 403 F.3d 727 (10th Cir. 2005) urged resolution by the Court on plain error by stating, "The stated goal of the guidelines was to create a system that diminishes sentencing disparities," *Booker* 125 S. Ct. At 759. "This goal in undermined when circuits apply different standards in determining whether a defendant sufficiently preserved his Sixth Amendment sentencing challenge in the district court, and is further undermined when circuits differ on how to deal with *Booker* claims on plain error review. Hopefully, the Supreme Court will promptly resolve these differences, and do so in a manner true to the essence of *Booker's* concern for basic rights of the defendant under the Sixth Amendment."

As Judge Bright recently stated in his dissent in the Eighth Circuit en banc decision in *United States v. Mooney*, No. 02-3388 (8th Cir. Oct. 10, 2005) " I urge the Supreme Court to resolve the circuits' split on this issue, to eliminate the geographic crazyquilt by which many criminal defendants, sentenced for similar conduct and crimes, receive dissimilar appellate treatment under Booker and, in many cases, disparate sentences.

[T]his circuit has said to defendants, in effect, "tough luck," and left it at that. Worse, the court has said that the single relevant objective fact that is likely to appear in the record – namely, a sentence at the bottom of the applicable guideline range – is not enough to indicate the requisite "reasonable probability" that the sentence would be lower under advisory guidelines. The court's willingness to apply here a doctrine that purports to resolve claims of legal error by posing a question that cannot, in the nature of the case, be answered suggests only that the court does not want to bother with most

cases of unpreserved *Booker* error."

This Court should heed the call and resolve these circuit splits so as to eliminate the endless disparity the divergent approaches are creating.

Whether the Remedy Announced In *Booker* Part II Denies the Right of a Criminal Defendant To a Jury Finding Protected By the Sixth Amendment

Nine and one half years of Hawkins ten year sentence was based on judge found sentencing factors determined under a preponderance standard. The remedy announced in *Blakely*, if adopted in *Booker* Part II, would have resulted in Hawkins receiving a six month term and his immediate release from prison. The mere invalidation of the sentencing guidelines as unconstitutional in *Booker* and the excision of only two sections 18 U.S.C. §(3553(b)(I) and 3742(e) is wholly inadequate when balanced against Hawkins right to be sentenced on the basis of facts charged in the indictment and determined by a jury beyond a reasonable doubt or admitted by the defendant. None of which occurred in the case at bar. (See also *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) and *Ring v. Arizona*, 122 S.Ct. 2426, 153 L.Ed.2d (2002).

The *Booker* Part II dissents forecasted the inevitable constitutional deprivations Booker remand defendants would suffer. Justice Stevens in his Booker dissent stated, "True, judges must still consider the sentencing range contained within the guidelines, but that range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U.S.C. § 3553(a). The result is certain to be a return to the same type of sentencing disparities Congress sought to eliminate in 1984."

During the time between the release of the *Blakely* opinion June 24, 2004 and the *Booker* opinion January 12,

2005 (7 months) the United States Department of Justice directed that federal prosecutors adopt practices that enabled them to charge and prove to the jury facts that increase the statutory maximum.[9]

As noted by Justice Stevens in his *Booker* dissent, enhancing the specificity of indictments would be a simple matter. The Blakely remedy would have been as easily implemented as the Apprendi remedy four years earlier. It is clear that this Court should revisit the remedial *Booker* decision. *Blakely* and *Booker* Part II addressed the Sixth Amendment deprivation created by the application of judge rather than jury found sentencing enhancements. The remedial wink and nod to an advisory guideline system does little to restore the Sixth Amendment protection that the Framers of our constitution intended. This Court should take a fresh look, now with the benefit of hindsight, and require no less than the constitution requires. The Framers would not have thought it too much to demand that before depriving a man of [nine and one-half more years] of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbors." 4 Blackstone, Commentaries on the Laws of England, 343 (1769)." This

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[9]Memorandum from Christopher A. Wray, Assistant Attorney General, U.S. Department of Justice, Criminal Division to all Federal Prosecutors, re:: guidance regarding the application of *Blakely v. Washington*, to pending cases.

This court now has the benefit of hindsight (9 months post *Booker*) to assess that the *Booker* remedial approach to preventing *Blakely* Sixth Amendment violations is not working. Evidence of this is readily visible with a mere glance to the circuit conflicts already addressed in this petition. The very disparity Congress sought to avoid through the passage of the 1984 Sentencing Reform Act has been elevated to an all time high by the remedial approach to remand and reasonableness.

A review of all of this Court's *Booker* related remands released on January 24, 2005 reveals gross disparity among criminal defendants depending upon where they were prosecuted and sentenced. (See App. D)

proposition is of no less import to Petitioner.

This Court's explanation in *Blakely* on the reason the Framers of the Constitution put a jury trial guarantee in the constitution was their unwillingness to trust the Government. Surely a case which takes a six month sentence to a ten year sentence is one that should be decided by a jury.

Whether a Hearing on a *Booker* Remand Is Essential To the Fair Administration of Justice

On June 22, 2005 the Honorable David R. Herndon issued a memorandum and order pursuant to a Seventh Circuit Paladino remand stating that the court would not, "Choose a different sentence in light of the new information that the Guidelines are now advisory". The court based its decision on a subjective analysis of its recollection of the evidence and without a hearing. The court's opinion is fraught with unilateral findings based on the sentencing record[10] almost three years earlier. The Seventh Circuit, in affirming the district court in a July 19, 2005 order held, "We do not think the imposed sentence should be deemed "unreasonable"."

It is impossible for this Court or any other to determine the reasonableness of Hawkins sentence on the basis of Judge Herndon's 18 U.S.C. §3553 analysis guided solely by speculation as to what Hawkins arguments would have been if he had been given an opportunity to be heard. The absence of a hearing on remand is not only in conflict with the practice and procedure of at least four sister circuits[11] but denied Hawkins an opportunity to put on

[10]Hawkins has pending, but on stay, a viable 28 U.S.C. §2255 alleging ineffective assistance of sentencing counsel.

[11]*United States v. Davis*, 407 F.3d 162 (3rd Cir. 2005); *United States v. Hughes*, 401 F.3d 540 (4th Cir. 2005); *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005); and *United States v. Ameline*, 409 F.3d

evidence, make arguments, offer rebuttal to the prosecutors and Courts perceptions, and the opportunity to make a record sufficient for the appellate court's "reasonableness" analysis. The court's introspective look through the lens of 18 U.S.C.§ 3553(a), with a patch over one eye and without the Petitioner's voice, is an abrogation of it's duties and a blatant denial of Hawkins constitutional rights. This Court recognized the importance of an 18 U.S.C. §3553 analysis by attaching the 3553 text to the *Booker* majority opinion as an Appendix.

Whether the Reasonableness Standard Announced By the Remedial Majority In *Booker* Should Be Revisited and Replaced

The Sentencing Reform Act of 1984 was passed by Congress in an effort to reduce disparity in Federal sentencing. The senate majority supported an independent commission to write the sentencing guidelines based on a belief that Federal judges could not be trusted to impose fair and uniform sentences. Sess. 130 Cong. Rec. 29730 (1984) (See, e.g.,130 Cong Rec. 976 (1984)(remarks of Sen. Laxalt and Sen. Mathias).

Support for the mandatory Guidelines in the Senate was premised on the lack of confidence in the discretion afforded Federal judges in sentencing. This is evidenced in comments from Senator Laxalt wherein he stated, "[T]here is little reason to believe that judges will now begin to do what they have failed to do in the past." Recognizing the disparity problem pre-1984 Senator Laxalt noted, "the present problem with disparity in sentencing ...stems precisely from the failure of [F]ederal judges - individually and collectively - to sentence similarly situated defendants in a consistent reasonable manner." (Quoted in Justice Stevens dissent in *United States v. Booker*).

1073 (9th Cir. 2005).

Ironically, nine months post *Booker* the very same problem exists. *Booker's* remedial mandate has paved the way for Federal judges to sentence on whim or bias so long as the magic words are stated that the court considered, but rejected, the Federal Sentencing Guidelines. After such, as in this case, the novel and nebulous term "reasonableness" attaches and makes virtually every post *Booker* sentence insulated from scrutiny and appellate review. Justice Stevens in the *Booker* dissent envisioned this problem when addressing concern over the wisdom of the remedial majority's position by stating, "The consequences of such a drastic change - unaided by the usual process of legislative deliberation - are likely to be sweeping. For example, the majority's unnecessarily broad remedy sends every Federal sentence back to the drawing board, or at least into the **novel review** for "reasonableness", regardless of whether those individuals' constitutional rights were violated. It is highly unlikely that the mere application of "prudential doctrines" will mitigate the consequences of such a gratuitous change." (emphasis added)

Justice Scalia in his *Booker* dissent addressed the problem that has clearly evolved post *Booker* with the "reasonableness" standard of appellate review when he stated, "[T]here is no one size fits-all "unreasonableness" review." In creating the reasonableness standard the remedial majority has enacted one that statute nor Congress set forth. It is not surprising that the post *Booker* results are so disparate. (See App. B) Allowing the district courts and circuit courts to determine whether a discretionary sentence is reasonable is fraught with the same problems existing pre *Crawford v. Washington*[12], regarding the Sixth Amendment and judicial determinations of "reliable" hearsay.

In *Crawford v. Washington*, there was a divergence

[12]541 U.S. 36, 1234 S.Ct. 1354 158 L.Ed.2d 177 (2004)

from the prior approved standard in *Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed 2d 597, 100 S.Ct. 2531, where [*Roberts*] framework was referenced unpredictable. In *Crawford* and in this case, whether a statement is deemed "reliable" or a sentence "reasonable" depends on which factors a judge considers and how much weight he accords each of them. The same is true of the reasonableness standard now used to measure sentence validity, post *Booker*.

The Sixth Amendment requires that any factor that increases punishment must be decided by a jury not a judge. The "reasonableness" standard enunciated in *Booker*, Part II, allows for unpredictability and inconsistent application. The nebulous standard fails to interpret the Sixth Amendment right to jury trial in a way that secures its intended constraint on judicial discretion. The Sixth Amendment right to a jury trial must not be replaced by the courts own devise - reasonableness. Reasonableness is too broad. The framework for a reasonableness analysis, if any, is so unpredictable that it fails to provide meaningful protection for Sixth amendment violations.

Reasonableness, as **reliability** described in *Crawford v. Washington*, 541 U.S. 36 1234 S.Ct. 1354 158 L. Ed 2d 177 (2004), is an amorphous if not entirely subjective concept. The vast inconsistencies and ambiguity in both district courts and circuit courts on *Booker* remand, when making a reasonableness analysis, reveals a fundamental failure in *Booker*, Part II to ensure Sixth Amendment jury trial rights in a way that secures its intended constraint on judicial discretion. Hawkins cases is a perfect example.

In this case the "reasonableness" standard, as in *Crawford* on "reliability" and the Confrontation Clause, violence is done to the amendments design by replacing categorical constitutional guarantees with open-end balancing tests in cases of reasonableness and the Sixth

Amendment. "Vague standards are manipulable, and while that might be a small concern in run of the mill [assault] prosecutions like this one, the Framers had an eye toward politically charged cases like [Raleigh's] - great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear."[13] Crawford, supra.

The Seventh Circuit in *United States v. Williams*, No. 03-4091, (7th Cir., October 6, 2005) addressed "reasonableness". If a sentence falls within the guideline range it is presumed reasonable. An appellant may rebut the presumption of reasonableness if he can demonstrate that his sentence would be unreasonable when measured against the factors set forth in 18 U.S.C. 3553(a), *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005). A review of the available circuit court case law on reasonableness suggests that no real definition is given.

Because "reasonableness" is inherently a concept of flexible meaning, generally lacking precise boundaries, the Second Circuit in *Crosby*, 397 F.3d 103 (2005) declined to fashion any per se rules as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline. The Second Circuit went further to state that "such per se rules would risk being invalidated as contrary to the Supreme Court's holding in Booker, FanFan, because they would effectively re-institute mandatory adherence to the guidelines. (See *Booker/FanFan*, 125 S.Ct. At 794 (Scalia, J. dissenting in part). It is clear that the vague and subjective "reasonableness" standard of review returns Federal sentencing to its state pre 1984.

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[13]Hawkins' relentless and valid recusal efforts have been denied. He has been left with a judge with bias, if for no other reason than the recusal efforts, to decide if his sentence is reasonable and a circuit court deferring to his verbage in support.

Whether District Court's Unilateral Review of Hawkins Sentence on Remand Was Reasonable

The Seventh Circuit's decision on the procedural framework for Booker plain error remands was set out in *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005).

The *Paladino* court noted that the key issue left open by the court's decision in *Booker* was the application of the plain error doctrine to appeals from sentences rendered under the Federal Sentencing Guidelines before the Supreme Court ruled they are advisory rather than mandatory. The *Paladino* court held that the only practical way to determine whether the kind of plain error argued in that case occurred was to ask the district judge. In agreeing with the second Circuit in *United States v. Crosby*[14], Paladino ordered a limited remand to permit the sentencing judge to determine whether he would (if required to re-sentence) reimpose his original sentence. The *Paladino* court left to the district courts discretion whether or not to conduct a hearing.

The district court judge in Hawkins denied relief without a hearing. His opinion was based on erroneous information, was unreasonable, failed to adequately consider 18 U.S.C. §3553(a) factors, and prevented Hawkins from making a record for appellate review.

An explanation in support of the contentions will follow. It should be pointed out from the onset that this explanation is being provided to show this court further that the "reasonableness" standard needs to be revisited and replaced.

The district court order (App. C) denying *Booker* relief reflects that the judge considered the parties briefs, the December 19, 2002 sentencing transcript, the presentence

[14]397 F.3d 103 (2d Cir. 2005)

report, and letters submitted to the court prior to the 2002 original sentencing in support of Hawkins.

Absent from the opinion was any reference to the court's ability to be fair when considering it's new-found discretion given that Hawkins had unsuccessfully tried to have the judge recused[15] because of the potential for him to be a witness in Hawkins pending 28 U.S.C.S 2255. This involved what Hawkins contended was the illegal permanent sealing of his original indictment (later unsealed by the Seventh Circuit on appeal). Hawkins prosecutor, Miriam Miquelon, later U.S. Attorney for the Southern District of Illinois resigned under a cloud from a position she fought for and obtained despite fierce opposition. Hawkins in his 2255 alleged misconduct on her part and referenced apparent ex-parte conversations between Miquelon and the district court.

Hawkins remand sentencing brief specifically requested the opportunity to present oral argument to the

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[15]Simultaneous to the filing of Hawkins 28 U.S.C. §2255 he filed a motion to recuse the judge as he was a potential witness. The trial court denied this request. He filed an unsuccessful writ of Mandamus to the Seventh Circuit Court of Appeals on the recusal issue. Hawkins also filed in his position paper on remand to the Seventh Circuit a reassignment request based on the same reasons, pursuant to Seventh Circuit Rule 36, Reassignment on Remanded Cases. The purpose of Rule 36 is to avoid, on retrial after reversal, any bias or mind set the judge may have developed through the trial. Hawkins argued in his Seventh Circuit Rule 54 paper that the potential for bias given the procedural history post sentencing, the cloud surrounding the departure of AUSA/USA Miriam Miquelon, and Judge Herndon's role as a witness required reassignment pursuant to Rule 36. The Circuit Court in its remand did not address the issue of reassignment. Judge Herndon's order of June 22,2005 certainly reflects the attitude of a judge who had lost his impartiality. Much of the order is nothing more than a character assassination of a man based on his unpopularity with eight of 18,500 company employees he supervised as the Chief Executive Officer of Exide Batteries. They were Barnes, Luxader, Calio, Stewart, Beidler, and Randalls, all of whom feared indictment.

The judge's personal bias was evident in the choice of his words in the opinion and reliance on unsupported hunches and speculative conclusions. Judge Herndon's discretion was dampened by Hawkins exercise of his constitutional rights to have his case decided by an impartial judiciary.

court in support of his request for re-sentencing.

Despite the district judge's reference in its June 22, 2005 opinion that each party had thoroughly briefed the matter, Hawkins did not nor should he have presented the fact specific panoply of 18 U.S.C. §3553(a) factors the district court could now consider in his remand brief. These are very fact specific factors and could not possibly be adequately presented in a remand brief to the district court.

While counsel in the remand brief argued generally that Hawkins should be granted the opportunity to present any relevant evidence about his personal history and characteristics, no specifics were given.

As noted in Hawkins remand brief to the district court the *Paladino* dissent held that the remand process should not be taken as an invitation for the district court to give only a superficial look at the earlier unconstitutionally "imposed sentence". 401 F.3d at 486 (Ripple, J dissenting) reviewing judges, in assessing *Booker*, 125. Ct. At 765-66, that "defendants have the opportunity to argue these factors in a full re-sentencing hearing and have them reflected in the record." 401 F.3d at 488. (Kanne, J. Dissent). Hawkins in his remand brief argued, "This court must not prejudge or reevaluate evidence which has never been presented to it, but evidence which, under *Booker*, it must allow Mr. Hawkins to present and it must now consider." To the contrary, this is precisely what the district court did in denying re-sentencing.

It is important to note that the court relied on the December 19, 2002 sentencing transcript. Hawkins was then represented by Oscar Stilly. Hawkins contends in a separate and pending 28 U.S.C. §2255 that Stilly was ineffective.

The Court acknowledged that it reread Hawkins 2002 character letters. These letters were mostly from

family and friends as noted by the court in its June 22, 2005 opinion. What the court did not consider were 57 recent letters prepared and available for re-sentencing written by Hawkins former employees, business associates, and customers[16]

The court in its June 22, 2005 order references a December 2002 comment at sentencing "and the sentencing guidelines do, in fact, give the court very little room for movement, in fact, in this case give me absolutely no room for movement. (December 19, 2002 TR at 141). Contrary to the district court's suggestion in the June 22, 2005 order that this was merely a way to dispel hope in persons less experienced in the intricacies of guideline policies," the government in its position paper to the Seventh Circuit on remand stated the same transcript excerpt immediately prior to conceding the existence of plain error in this case.

As to the 18 U.S.C.§3553(a) factors the court went through each and surmised they would not have mattered if considered. This conclusion, of course, was revealed without any evidence or input from Hawkins in support. Ironically, this position taken by the court is evidence that they did not matter. The court was not considering anything in mitigation of sentence. 18 U.S.C. §3553 factors, on a cold record without supporting facts or evidence, are useless in making a proper analysis for re-sentencing.

As noted by Judge Kanne in the *Paladino* dissent, "[I]t is hard to see how, without a hearing and briefs tantamount to re-sentencing by normal vacature and remand procedures, a district court could even give "an appropriate

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[16]Hawkins under separate cover and pursuant to Supreme Court Rule 32 is seeking permission to supplement the record with supporting evidence including new letters to balance the one sided and blind retrospective view of Judge Herndon regarding Hawkins character and business practices. If granted, the supplemental evidence will be cited as (Supp. App. _) indicating Supplemental Appendix and item number.

explanation" for it's decision not to re-sentence (especially without a hearing), that judge is effectively letting stand a sentence imposed under an unconstitutional regime."

The following conclusions of the district court in the June 22, 2005 order must be addressed for a "reasonableness" finding:

COURT OPINION (APP. B)	HAWKINS RESPONSE
The case involved bad consumer car batteries entering the stream of commerce. (District Court Opinion, p. 3)	The batteries were defective because of production start-up problems. All batteries fail. Hawkins had battery experts available to testify at a hearing. (See Robert Hojna Letter, Supp. App. B)
How many mothers with babies were stranded, how many people were late to work, how many production hours were lost. (District Court Opinion, p. 4)	Hawkins also had Sears/Exide correspondence to prove Sears had knowledge of all the problems and continued for years to sell Exide batteries. (Supp. App. C) More evidence of this would have been offered at re-sentencing. Not one instance of anyone being stranded was presented at trial.

The court considered the brutal manner in which defendant ran his business. (District Court Opinion, p. 4)	Hawkins was not on trial for his management style. The court heard only from 8 of 18,500 Exide employees who worked for Hawkins. Hawkins is attempting to supplement the record with a host of letters (App. D) to the contrary and was prepared to offer live testimony to counter this perception at a re-sentencing. The majority of Exide employees testifying against Hawkins at trial were fearful of indictment. Robert Lutz, former CEO of Exide testified not everyone has the tools to be a CEO. (Supp. App. E)
He brought down others (Pearson, Gauthier) (District Court Opinion, pgs. 4-5)	The government sought and the court applied sentencing enhancements holding Pearson equally culpable as Hawkins. This would have been easily rebutted at sentencing. (Supp. App. F)
Good outweighed by bad. (District Court Opinion, p. 5)	Hawkins good deeds were not to cover bad deeds. People would have testified to his altruistic nature and his sensitive side. (See Supp. App. D)

Putting up a charitable front to cover for dastardly deeds. (District Court Opinion, p. 5)	No evidence of this. Good deeds would have been presented at hearing in testimony and documents. (See Supp. App. D)
Send a message to business community. (District Court Opinion, p. 6)	Disparity between co-defendants and other corporate wrongdoers would have been documented at a hearing. Sears paid $67 million to settle the battery case and a more serious fraud alleged based on its Accubalance division. Sears received pretrial diversion and not one Sears Executive was indicted.
Hawkins danger to the public. (District Court Opinion, p. 7)	The court in releasing Hawkins on bond after verdict made a determination he was not a danger to the community. (Sup. App. G)
Bribed company that did testing for consumer report. (D. C. Opinion, p. 7)	This was not charged conduct. *Blakely* precludes the court from considering.

His age and experience suggests that the court need not be concerned over educational or vocational matters. He is quite wealthy and when he is released from prison, he need not worry about employment. (District Court Opinion, pgs. 7&8)	Age is a factor as is lack of criminal history. Hawkins financial status has changed drastically from the three year old information contained in the presentence report. Evidence at re-sentencing would have been offered in support.
Hawkins drug others into his criminal acts. (District Court Opinion, p. 8)	Joe Calio pushed the Gary Marks gratutity. Marks suggested it. Gauthier and Pearson were stated by the government as all knowing participants. (Supp. App. F)

Additionally, Hawkins was never indicted as being a ring leader or paying gratituties to Mark Graham, Kahn Laboratory or Tim Findley. Yet, this formed the basis of substantial sentencing enhancements not decided by the jury. It is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person. *United States v. Paulinski*, 374 F.3d 536 (7th Cir. 2004)

It [is] impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a non-guidelines sentence. *United States v. Crosby*, 397 F.3d 103 (2nd Cir. 2005). The same is true in a case where the judge unilaterally speculates on 18 U.S.C. §3553 factors absent a hearing and input, testimony, and evidentiary material from the parties.

Booker suggests that the sentencing factors articulated in §3553(a) which the mandatory application of the guidelines made dormant, have a new vitality in channeling the exercise of sentencing discretion. *United States v. Trujillo Terra*, 405 F.3d 814, 819 (10th Cir. 2005) See also *United States v. Dean*, 414 F.3d 725 (7th Cir. 2005).

The district courts refusal to give Hawkins a sentencing hearing and the requested relief was not "reasonable" when weighed against the 18 U.S.C. §3553(a) factors. Hawkins would have advanced at a hearing.

At the heart of Rule 32's notice requirement is the principle that a defendant should be sentenced only after "focused, adversarial development of the factual and legal issues relevant to determining the appropriate guidelines sentence". *Burnes v. United States*, 501 U.S. 129, 136-37 (1991).

This did not occur in the instant case. 18 U.S.C. §3661 provides that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court...may receive and consider for the purpose of imposing an appropriate sentence." This section has taken on new meaning post Booker. The denial of relief, absent a hearing, precluded Hawkins from being able to present factors supporting a departure from the advisory guideline range or make an appellate record.

CONCLUSION

For the reasons set forth above, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment. The only recourse Hawkins has to expose the hiding of exculpatory evidence by the governments illegal sealing of his original indictment is via a 28 U.S.C. §2255 to be heard by the same judge refusing to recuse himself after a valid challenge.

Respectfully submitted,

/s/Susan G. James, Esq.
Counsel of Record for Arthur M. Hawkins

October 17, 2005

APP. A

SUPREME COURT OF THE UNITED STATES

03-1326

ARTHUR M. HAWKINS,

PETITIONER

V.

UNITED STATES

ON PETITION FOR REHEARING.

THIS CAUSE HAVING BEEN SUBMITTED ON THE PETITION FOR REHEARING.

ON CONSIDERATION WHEREOF, IT IS ORDERED AND ADJUDGED BY THIS COURT THAT THE PETITION FOR REHEARING IS GRANTED. THE ORDER ENTERED JUNE 21, 2304, DENYING THE PETITION FOR A WRIT OF CERTIORARI IS VACATED. THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED, AND THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS VACATED, AND THE CASE IS REMANDED TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FOR CONSIDERATION IN LIGHT OF UNITED STATES V. BOOKER, 543 U.S. _(2005).

JANUARY 24, 2005

APP. B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

ARTHUR M. HAWKINS,

DEFENDANT.

NO. 01-CR-30006-DRH

MEMORANDUM AND ORDER

HERNDON, DISTRICT JUDGE:

The Court has before it, on limited remand pursuant to the Seventh Circuit's practice announced in United States v. Paladino, 401 F.3d 471 (7th Cir. 2005), an opportunity to consider whether it would have imposed a different sentence than the sentence of one hundred and twenty months previously imposedwhen the Sentencing Guidelines were considered by all to be mandatory. Counsel for each party have thoroughly briefed this matter, the Court has reread thetranscript from the December 19, 2002 sentencing hearing, reviewed the presentenceinvestigation report and, importantly for the Defendant, the Court has reread themany, many letters it received in support of the character of the Defendant.1 Given this full review, the Court does not require oral argument.

For the reasons set out below, the Court would not have sentencedDefendant to a different sentence had it considered the Guidelines as advisory rather than mandatory.

First, a word about the Court's comments during the sentencing hearing. The Defendant now suggests that the Court was constrained in leniency by the guidelines in the Court's comments regarding how little discretion the Court is given by those Guidelines. Obviously, different judges handle these matters in a variety of ways in order to explain to persons less experienced in the intricacies of Guideline policies. As all judges, this judge appreciates the time and trouble that the writers of letters take in trying to explain the character of the Defendant to the Court.

Unfortunately, it is obvious from reading many of such letters that such Guideline novices have unreasonable expectations regarding what a sentence can be. For example, it is not unusual for a writer, particularly a relative, to express the opinion that the Defendant has learned from his mistake, paid a sufficiently heavy price due to his humiliation in the community and so prison is not necessary and won't the Court please send him home after the hearing. Consequently, in the days of mandatory Guidelines, the Court was able to explain to those writers of such unreasonable letters that their loved one or friend was not going home, in part, because that was beyond the Court's discretion. That certainly was the purpose of the comments upon which the Defendant at bar seized to suggest that this Court perhaps was considering something less than a Guideline type sentence. Of course, one must remember in this case that the Guideline calculations actually exceeded the statutory maximums and the Defendant was sentenced pursuant to the statutory maximums. In fact, the Court stated, "By virtue of the combination of the guidelines and the statutory maximum, the combination of the two really call for only one particular sentence, and I think Mr. Hawkins is already aware of that." (Sent. TR. p. 152).

The Defendant moved for a downward departure at the sentencing hearing but that motion was denied. In so deciding, the Court found that it had the discretion to make a downward departure but refused to exercise its discretion to do so. Analyzing the sentence for reasonableness within the confines of 18 U.S.C. §3553(a) does not change the result.

First, the Court looks at the nature and circumstances of the offense and the history and characteristics of the Defendant. The crime was national in scope. Financially, it only affected one victim and that was a party who executed a diversion agreement to avoid criminal prosecution and so one might argue that we are strained to feel too sorry for such a "victim." The Defendant makes much of the "fact" that no consumers were financially at risk as a result of this criminal endeavor. However, we apparently must be reminded that this case involved placing bad consumer car batteries into the stream of commerce. While it is true that Sears made good on the consumer warranties and Exide worked out an agreement with Sears. Is it speculation or a stretch to understand how the consumers became aware that they had a warranty claim regarding their Die Hard Battery™ with Sears. How many mothers with babies were stranded who knows where and in what weather conditions with a dead battery? How many people were late to work? How many production hours were lost to the American economy as a result? The inferences of this scheme to stick the consumers with defective batteries is limitless. So, to suggest that there were no reports of consumer losses may be technically correct, but only because no one made an effort to collect the thousands of hardship stories or to perform the economic analysis of the harm done to productivity. In this respect, one could argue that the enhancements applied by the use of the Guidelines hardly could cover the wrongs committed by this Defendant. But to do so, would invite speculation since the Guidelines do require more specificity than that. The specifics utilized in making the Guideline calculation certainly adequately address the nature and circumstances of the offense at bar.

As for the character of the Defendant, while it is true the Cou[illegible] received and took into account many letters attesting to his character both professionally and personally, the Court also heard sworn testimony during the trial regarding the brutal manner in which Defendant ran his business. The old adage, "my way or the highway," comes to mind, except that his way was damaging and criminal and he brought down other people who likely would not have ever considered committing crimes without his imposing and brutal manner. Unfortunately for the Defendant and all the good the letters point out that he had done, his actions at Exide far outweigh and exceed those good deeds. One wonders about the motivation for those good deeds as will be analyzed below. The Guideline calculation is an appropriate means to address the characteristics of this Defendant as demonstrated by his criminal activity.

The need to reflect the seriousness of the offense, promote respect for the law and provide just punishment for the offense are all addressed by the calculation of the Guideline and the policy considerations that went into those calculations. The Defendant has aptly pointed out that a number of enhancements were applied. However, all the enhancements were based on evidence which the Court heard during this three month trial. This was an intricate scheme. However, aside from the scheme itself, the Court heard evidence of other acts intertwined within the criminal scheme at bar, as well as FEDERAL RULE OF EVIDENCE 404(b)material which demonstrated that this Defendant had little respect for the law. His respect was focused on himself and what people thought of him. Whether that was his board and his shareholders because of the bottom line he was able to produce, or some more charitable front he was putting up in other areas for people to form a certain opinion about him. Likely, in case his criminal and other dastardly deeds should come to light. The Guideline calculation seems to adequately impose just punishment and promote a respect for the law on one who had little concern for it before.

In order to afford an adequate deterrence to criminal conduct, the Court should send a significant message to this Defendant and the business community at large that defrauding the public will be addressed by the courts objectively and seriously, as well as with the message that one must not repeat his deed or the observer looking on must not consider a like endeavor. One hundred and twenty months sounds like a lot of prison time, even when talking about the need for substantial deterrence given the scope of this nation wide consumer fraud. This case arose at a time when there seemed to be a multitude of corporate scandals in the news. It seemed that corporate officers of the thinking possessed by Arthur Hawkins felt that the bottom line was more important than the law and white collar criminals, if they were ever prosecuted, were not dealt with too harshly. Besides everybody knows the best defense to any criminal charge is a large checkbook. To its credit, the government chose not to let that attitude prevail. There is a message to be sent.

However, in analyzing this sentence one must remember that this Court did not upward depart to send a "message." The Court did not even end up sentencing within the Guideline range, due to the statutory maximums. The Guideline calculations, in their infinite, albeit cold, wisdom, merely considered a minimal base offense level (six), added on a specific offense level due to a million and half dollar loss (twelve), as well as a specific offense level for the national advertising aspect of the scheme (two) and its intricate nature (two), added four levels because he was the leader (his way or the highway), added two more levels for abuse his private trust given his corporate position, added to his prison time because he paid somebody to lie under oath (two) and acknowledged that he failed to accept responsibility, thereby failed to reward him with a three level credit. So, the Court would submit that it is only in the abstract of the various policy considerations of the Sentencing Commission where one could argue that this sentence really even constitutes a message. The need to protect the public is clear. A business man like Arthur Hawkins performing in the manner displayed in this case, on any scale, would be a danger to the public. His attitude of profit over

the interests of the consumer are devastating when he utilizes his obvious intelligence for schemes to avoid detection. One must not forget that this is the man that bribed the company that did testing for Consumer Reports to make his company's battery appear better in its report than it really was in order to fool America's consumers. It would seem that the Guideline calculation adequately addresses this issue as well. Providing the Defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner would appear to be factors of little value to the Court's consideration in this case, except that the Defendant clearly needs imprisonment rather than some alternative thereto.

His age and experience suggests that the Court need not be concerned with educational or vocational matters. He is quite wealthy and when he is released from prison, he need not worry about employment. No health matters were brought to the Court's attention, particularly not anything that the prison bureau's health care system could not provide for. Mr. Hawkins suggested to the Court that his family history was such that he would not survive the length of this prison term. That, of course, is rank speculation and he did not provide any medical records to suggest he had particular health concerns to back up his suggestion. As to the kinds of sentences available, in light of the advisory nature of the Guidelines, probation is statutorily available for a period of one to five years as to each count. However, given the devastation visited upon the nation and the people that Hawkins drug into his criminal acts and who took a fall because of him, it would be a travesty if this Court were to place him on probation rather than the prison sentence that has already been imposed on him.

The Court is to consider the policies and calculations of the Sentencing Commissions and the Guidelines issues by the Commission and the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. As the Court has pointed out throughout this analysis, the Court has determined that the Guideline calculations best address all of the issues in this case.

They do so from the standpoint of dispassionately considering the issues that arose in the evidence at trial, as well as avoiding a disparity between this Defendant's sentence and a like defendant's elsewhere.

This Court is quite confident in his finding that the consecutive sentence of sixty months as to each of Counts one and two for a total of one hundred and twenty months is appropriate and reasonable as the statutory maximum in light of the fact that the Guideline advisory sentence actually exceeds that total maximum. Therefore, in answer to the inquiry of the Seventh Circuit Court of Appeals, this Court would not choose a different sentence in light of the new information that the Guidelines are now advisory.

IT IS SO ORDERED.
Signed this 22nd day of June, 2005.
/s/ David R. Herndon
United States District Judge

APP. C

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 19, 2005

Before

Hom ILANA DIAMOND ROVNER, *Circuit Judge*

Hon DIANE P WOOD, *Gircuit Judge*

Hon. ANN CLAIRE WILLIAMS *Gircuit Judge*

Nos 03-1005 & 03-1232

Appeal from the United States District Court for the Southern District of Illinois

United States of America
Plaintiff-Appellee,

v. No.01 CR 30006

Arthur M. Hawkins,

David R. Herndon,
Defendant-Judge.
Appellant

ORDER

On August 14, 2003, we issued an opinion affirming the convictions of Arthur Hawkins and his co-defendant. *United States v. Pearson,* 340F.3d459 (7th Cir. 2003). On January 24, 2005, the United States Supreme Court granted Hawkins's petition for a writ of certiorari. *Arthur M. Hawkins v. United States,* 125 S. Ct. 1109 (2005). The Court vacated Hawkins's judgment and remanded his case to this court for further consideration in light of *United States v. Booker,* 125 S. Ct. 738 (2005).

Pursuant to Circuit Rule 54, each party then filed a statement of position as to the proper action in light of the Supreme Court's order. After considering these statements, we ordered a limited remand so that the district court could determine whether it believed Hawkins's sentence remains appropriate now that *Booker* has Nos. 03-1005 & 03-1232

relegated the United States Sentencing Guidelines to advisory status. *See United States v. Paladino,* 401 F.3d 471 (7th Cir. 2005).

The district court judge has replied that he would impose the same sentence today knowing that the Guidelines are not mandatory. Therefore, we will affirm the original sentence so long as it is reasonable. *See Paladino,* 401 F.3d at 484.

On June 23, 2005, we invited the parties to file any arguments concerning the appropriate disposition of the appeal in light of the district courts decision. We have received and considered each party's submission.

In sentencing Hawkins the district court first determined that the applicable Sentencing Guidelines range was 121 to 151

months. It then imposed a sentence ofCO months on both counts of convictions, to run consecutively, for a total of 120 months, the statutory maximum. We recently held that a sentence within the Guidelines range is presumptively reasonable. *United States v. Mykytiuk,* 2005 WL 1592956, at *1 (7th Cir. July 7, 2005). Here, because of the presence of a statutory maximum, Hawkins received a sentence even lower than that specified by the Guidelines. The district court judge explained his belief that the sentence was required to reflect the seriousness of Hawkins's conduct, which was national in scope, and to deter further criminal conduct. The district court judge also explained that although he considered the many letters attesting to Hawkins's character, he believed that the testimony at trial concerning the "brutal manner" in which Hawkins ran his business and his actions at the company outweighed any good deeds. We do not think the imposed sentence should be deemed "unreasonable." Accordingly, the judgment of the district court is AFFIRMED.

APP. D

Case History Results on Summary Disposition of Petitions for Certiorari dated January 24, 2005

	On Remand	Unknown Result	Harsher Sentence	Lesser Sentence	Same Sentence	Dis-missed
1ST Cir.		000000000	0		00	
2nd Cir.		000000000000 00000000				
3rd Cir.	000000	0000000000000			00	
4th Cir.	000000	000000000000 000000000000 000000000000 00000			000	
5th Cir.	000	000000000000 000000000000 000000000000 000			0000000 0000000 0000000 0000000 0000000 000	0
6th Cir.	0000	000000000000 000000000000 00000000000				0
7th Cir.	0	000000000000			0000000 0	
8th Cir.	000	0000000000000 0			0000000 0000000	
9th Cir.	00000000 00000000 0	0000000000000 000			000	
10th Cir.	0000000	0000			0000000 000000	
11th Cir.	00000	0000000000000 0			0000000 0000000 0000000 0000000 0000000 0000000 00	
D.C. Cir.	0				00	0

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OFFICE OF THE CLERK

NO. 05-715

In The Supreme Court of the United States

ARTHUR M. HAWKINS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

And now comes Arthur M. Hawkins, who respectfully petitions the Court, pursuant to Rule 44.2, for rehearing on his Petition for Writ of Certiorari, denied by order of January 9, 2006, upon the following question:

QUESTION PRESENTED

Whether the Seventh Circuit's imprimatur upon petitioner's sentence deprived him of a meaningful review for unreasonableness, under the Sixth Amendment and/or 18 U.S.C. §3553 (a), where the sentencing judge originally imposed and later justified the maximum sentence based upon guidelines unsupported by substantial evidence, even under a preponderance standard, supplemented by "speculation or a stretch"?

THE PARTIES

The above caption names all of the parties.

STATEMENT IN SUPPORT OF REHEARING

1. In *United States v. Booker,* the Court excised 18 U.S.C. §3742 (e), governing standards for appellate review of sentences, while preserving the right to appeal under 18 U.S.C. §3553 (a). 125 S.Ct. 738, 744-745 (2005). The Court recognized a standard of review for "unreasonableness", implied by "the sound administration of justice." *Id.*, citing *Pierce v. Underwood,* 487 U.S. 552, 558-560 (1988).

2. On remand, the district court reimposed a ten (10) year maximum statutory sentence, under greatly enhanced guidelines recommending eighteen (18) months, supported in substantial part as follows:

> ... While it is true that Sears made good on the consumer warranties and Exide worked out an agreement with Sears. (sic) Is it speculation or a stretch to understand how the consumers became aware that they had a warranty claim regarding the Die Hard Battery™ with Sears. How many mothers with babies were stranded who knows where and in what weather conditions with a dead battery? How many people were late for work? How many production hours were lost in the American economy as a result? The *inferences* of the

scheme to stick the consumer with defective batteries is (sic) *limitless*.

> District Court Opinion on remand,
> Herndon, D.J., at 3 (emphasis added)

There was no evidence below that any consumer lost money, or any mother was stranded, with or without a baby, anyone was late for work, or any production hours were lost. Yet, the incantation of these "unlimited inferences" is part of the calculus for the maximum sentence being imposed upon a 59 year old first offender. Without minimizing the seriousness of the crimes, substantial grounds are presented for the Court's determination whether hyperbole may substitute for reason to support a sentence under a post-*Booker* standard of review.

3. Throughout his appeal, petitioner has sought to prove that his sentence is founded upon various considerations *dehors* the record. The denial of his motion for hearing on remand deprived him of any opportunity to rebut the presumption that the sentence is reasonable, effectively rendering it a conclusive presumption. The Circuit Court then applied this presumption in its otherwise cursory review of the sentence. Although this Court ordered remand for review under *Booker,* there has been no meaningful post-*Booker* review for unreasonableness. At a minimum, the sound administration of justice requires one.

CONCLUSION

There being substantial grounds for appeal not previously presented, the Petition for Rehearing should be granted under Rule 44.2.

CERTIFICATE OF COUNSEL

As counsel for petitioner, I hereby certify that the Petition for Rehearing is presented in good faith, not for delay and is restricted to the grounds specified in Rule 44.2.

Respectfully submitted,

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